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July 23, 2001

Magalie Roman Salas
Federal Communications Commission
Secretary
445 12th Street, SW
Washington, DC 20554

RE: **I/M/O the Division of the Ratepayer Advocate's Petition for Declaratory Ruling Seeking Preemption of Certain Legal Requirements Imposed Upon Telecommunications Carriers by the New Jersey Board of Public Utilities Relating to Sections 251 and 252 of the Federal Telecommunications Act of 1996 - CC Docket No. 00-49**

Dear Ms. Salas:

Please place the attached correspondence into the above captioned proceeding.

Very truly yours,

Gordon R. Evans

Enclosure

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Docket No. 00-2000

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AT&T Communications of New Jersey, Inc.,
Plaintiff in District Court

State of New Jersey Division of the Ratepayer Advocate,
Plaintiff-Intervenor in District Court
and Appellant

v.

Verizon New Jersey Inc.;
The New Jersey Board of Public Utilities, an agency; and
Herbert H. Tate and Carmen J. Armenti, in their capacities as
Commissioners of the Board of Public Utilities,
Defendants in District Court
and Appellees

On Appeal from an Order of the
United States District Court, District of New Jersey

BRIEF OF APPELLEE VERIZON NEW JERSEY INC. (FORMERLY KNOWN AS BELL ATLANTIC-NEW JERSEY, INC.)

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December 22, 2000

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CORPORATE DISCLOSURE STATEMENT

Appellee Verizon New Jersey Inc. ("VNJ"), formerly known as Bell Atlantic-New Jersey, Inc. ("BA-NJ"), is a wholly-owned subsidiary of Bell Atlantic Corporation, d/b/a Verizon Communications (trading on the NYSE as "VZ"). On June 30, 2000, GTE Corporation (previously trading on the NYSE as "GTE") merged with Bell Atlantic Corporation (previously trading on the NYSE at "BEL").

There is no publicly held corporation not a party to the proceeding before this Court that has a financial interest in the outcome of this proceeding.

COUNTER STATEMENT OF JURISDICTION

The U.S. District Court for the District of New Jersey ("District Court") retained jurisdiction in this case pursuant to Section 252(e)(6) of the Telecommunications Act of 1996, 47 U.S.C. § 252(e)(6). On June 6, 2000, the District Court issued a final order that, inter alia, affirmed the decision of the New Jersey Board of Public Utilities (the "Board") to approve the incorporation, in an agreement between BA-NJ and AT&T Communications of New Jersey, Inc. ("AT&T"), of rates determined by the Board in a comprehensive Generic Proceeding, rather than substantially divergent rates recommended in a prior arbitration. The District Court also reversed and remanded the

Board's methodology for establishing the Generic Proceeding rates.

On June 30, 2000 Appellant New Jersey Division of the Ratepayer Advocate ("RPA") filed a Notice of Appeal with this Court. While this Court has jurisdiction of appeals of all final decisions of the District Court under 28 U.S.C. § 1291, in light of the District Court's remand of the Generic Proceeding rates and factual developments since the District Court's ruling, this appeal has been rendered moot. In addition, the RPA lacks standing to bring this appeal because it has not been aggrieved by the District Court's disposition of the matter and this Court's resolution of the issues raised would afford the RPA no actual, affirmative relief. As discussed further in Argument, Point I, infra, this Court should decline jurisdiction to issue the purely advisory opinion sought by the RPA and dismiss this appeal.

COUNTER STATEMENT OF ISSUES

1. Whether this Court should decline jurisdiction to issue an advisory opinion that would have no effect either on the interconnection agreement at issue or on any party before the Court, where there is no reasonable likelihood that the unusual facts giving rise to the alleged violation will recur, interim events have eradicated the effects of the alleged violation, the Appellant RPA has not been aggrieved

by the District Court's disposition of the matter, and this Court's resolution of the issues raised would afford the RPA no actual, affirmative relief?

2. Whether the District Court erred in holding that the Board has legal authority to approve an interconnection agreement incorporating cost-based rates determined by the Board in a comprehensive proceeding, rather than rates recommended in an arbitration proceeding conducted prior to the completion of the comprehensive proceeding and based solely on a cost study that the Board determined did not produce just and reasonable rates as required by the Act?

3. Whether the District Court erred in holding that the Board has independent authority to impose additional requirements on a telecommunications carrier under Section 261 of the Act, where the Board's approval of the interconnection agreement at issue incorporating cost-based rates determined in the Board's comprehensive proceeding was entirely consistent with the Act?

COUNTER STATEMENT OF THE CASE

The RPA appeals the District Court's decision holding that the Act authorizes the Board to approve for use in the AT&T/BA-NJ Interconnection Agreement rates determined in the Board's comprehensive proceeding ("Generic Proceeding") rather than the flawed rates determined in the arbitration which preceded

completion of the Generic Proceeding. This litigation began on November 24, 1997, when AT&T filed a complaint in Federal District Court seeking review under Section 252(e)(6) of the Act. The District Court entered a Consent Order for Intervention by the Ratepayer Advocate on February 2, 1998. On June 6, 2000, the District Court issued its ruling affirming the Board's decision to substitute the Generic Proceeding rates for the arbitrator's recommended rates in the AT&T/BA-NJ Interconnection Agreement, and remanding the Board's methodology for determining those Generic Proceeding rates. The RPA filed a Notice of Appeal on June 30, 2000. Additional procedural history is provided in the Counter Statement of Facts immediately below.

COUNTER STATEMENT OF FACTS

A. The Telecommunications Act of 1996

1. The Act's Substantive Requirements

On February 8, 1996, Congress enacted the Telecommunications Act of 1996 ("Act"), aimed at opening the markets for both local and long-distance telephone service to full competition.[1]

With respect to local service, Congress sought to create a mechanism for transition to effective facilities-based local telephone service competition, i.e., competition based on the

[1] Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. § 251 et seq.

use of network facilities other than those owned by local exchange companies, such as BA-NJ.[2] Congress "recognize[d] that it is unlikely that competitors will have a fully redundant network [i.e., one co-extensive with BA-NJ's network] in place when they initially offer local service," and that competitors may need initially to obtain some facilities and capabilities from ILECs.[3]

Congress imposed certain affirmative duties on ILECs to advance the transition toward facilities-based competition in the local market. In particular, under section 251 of the Act, ILECs like BA-NJ must: (1) allow competitors to "interconnect" with their network so that the competitors' customers can make calls to, and receive calls from, customers on the ILEC's network; (2) offer competitors "access" to "network elements" "on an unbundled basis" at cost based rates -- that is, allow competitors to use individual pieces of the ILEC's network

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[2] A local exchange carrier, or LEC, is "any person that is engaged in the provision of telephone exchange service or exchange access." 47 U.S.C. § 153(26). In layman's terms, a LEC is a provider of local telephone service, and an incumbent local exchange carrier, or ILEC, is the LEC that, at the time of the adoption of the Act, provided telephone exchange service in a particular area. BA-NJ is one of three ILECs in New Jersey. A competitive local exchange carrier, or CLEC, is a LEC that is not an ILEC; in layman's terms, a CLEC is a new entrant into the local telephone service market. AT&T is a CLEC in New Jersey.

[3] S. Rep. No. 230 104th Cong., 2nd Sess. (1996) (excerpts provided in Appellee's Supplemental Appendix ("___sa") submitted herewith, at 161sa-C).

referred to as unbundled network elements ("UNEs"),[4] and (3) offer competitors the ILEC's retail telecommunications service -- that is, all telecommunications service products that BA-NJ currently provides to its customers -- at discounted wholesale prices so that the competitor can resell those services to its own customers ("resale").[5]

The Act also includes several important limitations on these obligations that ensure the ILECs are treated fairly and compensated fully for the use of their private property.[6] These limitations further ensure that the duties imposed by section 251 of the Act are not applied so broadly as to undermine the ability of the ILECs to compete, thereby jeopardizing an opportunity to fulfill Congress's goal of promoting competition.

2. The Act's Implementation Mechanism

The Act imposes on both ILECs and CLECs "[t]he duty to negotiate in good faith in accordance with section 252 . . . the particular terms and conditions of agreements to fulfill" the specific duties imposed on ILECs by section 251, including

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[4] An example of a UNE is the "unbundled loop" which consists of the wires that connect a customer's premises to the ILEC's central office, i.e., the facility that houses the complex computer "switches" that route telephone calls to their destinations.

[5] 47 U.S.C. §§ 251(c)(2), (3), (4), (6).

those described above.[7] If the parties are unable to agree on all issues within 135 days after the CLEC's initial request for negotiation, either party may petition the State commission for arbitration of any open issues. After the arbitration the parties are to incorporate the results of their negotiations and the arbitration into an interconnection agreement, which they are required to submit to the State commission for its review.[8] The State commission then must either approve or reject the interconnection agreement embodying both negotiated and arbitrated terms.[9]

B. The Federal Communications Commission's First Report And Order Adopting "National Pricing Rules", Which Were Subsequently Struck Down In Federal Court

In accord with the long-standing statutory rule that the Federal Communications Commission ("FCC") lacks jurisdiction over intrastate matters such as local telephone service,[10] the

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[6] For example the Act provides that the rates that an ILEC is entitled to charge for its services shall be just and reasonable. 47 U.S.C. §252(d).

[7] Id. § 251(c)(1).

[8] Id. § 252(e)(1), (4). An interconnection agreement is the means by which Congress intended State commissions to ensure ILECs, such as BA-NJ, and CLECs, such as AT&T, comply with the Act in their relationships with each other. 47 U.S.C. § 252(e).

[9] Id. § 252(e)(1), (2). If the State commission should fail to act to carry out its responsibility under section 252, it would face FCC preemption of its jurisdiction over the proceeding.

[10] 47 U.S.C. § 152(b); Louisiana PSC v. FCC, 476 U.S. 355, 370, 106 S. Ct. 1890, 1899, 90 L.Ed.2d 369, 382 (1986).

Act does not provide the FCC an overarching role in implementing the local telephone service competition provisions of the Act. Instead, the FCC has authority over only specifically enumerated topics.[11] Nevertheless, in August 1996, on the eve of the AT&T/BA-NJ arbitration, the FCC issued a 700-page order seeking to regulate, among other things, the costing methodology for setting rates for interconnection, UNEs, and resale (the "FCC Order").[12]

The FCC Order purported to adopt "national pricing rules" and to relegate the states to the subordinate role of applying those rules mechanically to set individual rates.[13] The United States Court of Appeals for the Eighth Circuit first stayed and then ultimately vacated the FCC's pricing rules on the grounds that they were beyond the federal agency's statutory jurisdiction.[14] The United States Supreme Court subsequently

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[11] See, e.g., 47 U.S.C. § 251(d)(2) (giving the FCC authority to determine what network elements must be made available to competing carriers).

[12] See First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, CC Docket No. 96-98 (rel. Aug. 8, 1996) ("FCC Order") (18-25sa).

[13] FCC Order, ¶ 111 (19sa).

[14] See Iowa Utils. Bd. v. FCC, 109 F.3d 418 (8th Cir. 1996); Iowa Utils. Bd. v. FCC, 120 F.3d 753, 793-800 (8th Cir. 1997), rev'd in part and remanded sub nom. AT&T Corp., et al. v. Iowa Utils. Bd. et al., 525 U.S. 366, 119 S. Ct. 721, 142 L.Ed.2d 835 (1999).

reversed the Eighth Circuit's decision regarding jurisdiction,[15] and on remand the Eighth Circuit invalidated the FCC's initial pricing rules on substantive grounds.[16] The FCC and others have sought Supreme Court review of that ruling.

C. Proceedings in New Jersey

1. Procedures Established By The Board

In December 1995, prior to Congress's promulgation of the Act, the Board on its own initiative instituted a proceeding to establish the terms and conditions under which the local telephone exchange market in New Jersey should be opened to competition (the "Generic Proceeding").[17] On June 20, 1996 the Board established general procedures for both the Generic Proceeding and, under section 252 of the Act, an arbitration process, inclusive of Board review of interconnection agreements pursuant to the Act.[18]

On August 7, 1996, before any arbitration hearings had commenced, the Board made it clear that the information and

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[15] AT&T, supra, 525 U.S. at 377-86, 119 S.Ct. at 729-33.

[16] Iowa Utils. Bd. v. FCC, 219 F.3d 744 (2000).

[17] I/M/O Notice of Pre-proposal and Notice of Investigation Regarding Local Exchange Competition for Telecommunications Services, Docket No. TX95120631 (26-35sa).

[18] Decision and Order, I/M/O A Notice of Pre-proposal and Notice of Investigation Regarding Local Exchange Competition for Telecommunications Services, Docket No. TX95120631 (NJBPU June 20, 1996) ("June 20 Order") (included in the Appendix of Appellant RPA ("__a"), at 94-96a).

expertise acquired from the Generic Proceeding would serve as a guide to the Board in determining whether to approve or reject each interconnection agreement submitted for its review:

> [T]he information developed in this proceeding [i.e., the Generic Proceeding] may well be relevant in assisting the Board to avoid disparate or inconsistent decisions with respect to the issues in those arbitrations. Moreover, the [G]eneric [P]roceedings will provide an avenue by which parties not participating in negotiations and arbitrations can apprise the Board of important concerns on the very issues that the Board will later consider in its review of the agreements.[19]

A week later, on August 15, the Board set forth detailed procedures for the arbitrations and Board review of interconnection agreements.[20] The arbitration process was to consist of hearings and briefing before a designated arbitrator, with participation limited to only the requesting CLEC and BA-NJ. The RPA's participation in the arbitrations was restricted to filing comments at the time the parties submitted an interconnection agreement for the Board's review, since the RPA, as a full participant in the Generic Proceeding, would have the

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[19] See Prehearing Order, I/M/O the Investigation Regarding Local Exchange Competition for Telecommunications Services, Docket No. TX95120631 (NJBPU Aug. 7, 1996) ("August 7 Prehearing Order"), p. 3 (38sa).

[20] See Telecommunications Order, I/M/O the Board's Consideration of Procedures for the Implementation of § 252 of the Telecommunications Act of 1996, Docket No. TX96070540 (NJBPU Aug. 15, 1996) ("August 15 Order") (44-72sa).

opportunity during that proceeding to provide the Board with its input on all relevant issues "prior to the Board's decisions on agreements resulting from the pending arbitrations."[21] The Board made it clear that after each such arbitration, the parties would incorporate the results of the arbitration and parties' negotiations into an interconnection agreement which, in accordance with the Act, must be reviewed by the Board and would be rejected if the Board were to find that the arbitrated agreement failed to meet the requirements of sections 251 or 252(d) of the Act.[22]

2. The Implementation of The Board's Procedure Through The Interrelated Arbitration Process

On July 15, 1996, after BA-NJ and AT&T attempted to negotiate the terms of an interconnection agreement, AT&T filed a petition requesting arbitration.[23] On August 8, 1996, one day before BA-NJ's Response to AT&T's Arbitration Petition was due to be filed, the FCC set forth the new pricing methodology referenced above, known as Total Element Long-Run Incremental

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[21] August 15 Order, p. 16 and Appendix A, § C.13 (59sa, 72sa).

[22] Id. at pp. 3-4, 10-11, 14 and Appendix A, § C.10.c (46-47sa, 53-54sa, 57sa, 71sa).

[23] In re Petition of AT&T Communications of New Jersey, Inc. for Arbitration with Bell Atlantic-New Jersey, Inc. Pursuant to § 252 of the Telecommunications Act of 1996, BPU Docket No. TO96070519 (sometimes referred to as "AT&T Arbitration").

Cost ("TELRIC").[24] The FCC's regulations provided that all State commissions were required to follow the newly-announced TELRIC methodology in setting rates for interconnection and access to UNEs.[25] The FCC Order also recognized that local exchange carriers and the State commissions would not necessarily be able to comply with this pricing methodology within the time frames set forth in the Act for the completion of arbitrations and the review of interconnection agreements. Accordingly, the FCC established a default proxy rate schedule to be used on an interim basis until the commissions could review cost studies[26] that were prepared based upon the TELRIC methodology.[27]

Because of methodological differences between the extensive cost studies BA-NJ had already prepared and the FCC-mandated TELRIC studies, and the fact that the existing studies could not be revised within the extremely brief time frame between issuance of the FCC Order and the AT&T arbitration, BA-NJ was

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[24] The FCC found that this "forward-looking" methodology "best replicates, to the extent possible, the conditions of a competitive market." FCC Order, ¶¶679, 682 (23-25sa).

[25] Id. at ¶ 672 (22sa).

[26] Cost studies are based on certain assumptions incorporated into intricate computer models which calculate cost results that can be used to establish rates for interconnection and UNEs. See I/M/O The Investigation Regarding Local Exchange Competition For Telecommunications Services, Decision and Order, Docket No. TX95120631 (NJBPU Dec. 2, 1997) ("Local Competition Order") at p. 12 (12sa).

[27] FCC Order, ¶¶ 623, 767 (20-21sa, 25sa-A).

unable to submit cost studies in the AT&T arbitration.[28] BA-NJ accordingly requested the arbitrator to recommend the interim use of the default proxy rates which had been established by the FCC.[29]

Prior to the issuance of a decision by the arbitrator, the Interconnection Phase of the Generic Proceeding (which included the determination of costs and setting of rates) began before the Board. On November 4, 1996, the parties to the Generic Proceeding, including AT&T and the RPA, submitted prefiled testimony. BA-NJ finalized its cost studies based upon the newly developed TELRIC methodology in time to submit them in the Generic Proceeding. AT&T filed with the Board the identical cost analysis that it filed in the arbitration, i.e., the Hatfield Model Version 2.2.2, and urged the Board (as it had

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[28] Local Competition Order, pp. 222-223 (124-25a).

[29] The default rates that BA-NJ was forced to ask for on an interim basis were unrealistically low, but BA-NJ had no other viable choice. Conforming its studies to the FCC TELRIC costing methodology was not just a matter of changing numbers; BA-NJ had to make numerous judgments based on the FCC's direction and guidelines. This process required a substantial number of hours of time by skilled cost analysts and could not be completed in the time allowed for the accelerated AT&T arbitration. See Transcript of Arbitration Proceeding of October 7, 1996 at 187-88 (Wylonis) (92-93sa). AT&T, for its part, announced for the first time that the cost study upon which it would be relying in the arbitration would be a new version of its cost model. Over BA-NJ's objection, the arbitration went forward, even though AT&T was the only party with a cost study to present to the arbitrator.

urged the arbitrator) to establish interconnection and UNE rates based on that model.[30]

On November 8, 1996, the arbitrator issued an opinion which purported to address all the issues in dispute.[31] Regarding rates to be payable by AT&T for interconnection and UNEs, the arbitrator based his determination primarily on the cost study submitted by AT&T. Despite the fact that BA-NJ did not have the opportunity to submit its cost studies (which were not available until the subsequent Generic Proceeding), the arbitrator decided that the rates he recommended should be permanent,[32] instead of interim pending the outcome of the Board's review of the cost studies filed by all the parties in the Interconnection Phase of the Generic Proceeding.[33]

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[30] The Hatfield Model Version 2.2.2 was a computer based model which contained hundreds of assumptions and hundreds of undocumented algorithms. During the arbitration, BA-NJ introduced testimony that it did not have sufficient time to review the "model" and that, moreover, sufficient documentation and information necessary to review the model was not provided. See Transcript of Arbitration Proceeding of October 7, 1996 at 70-87 (Wylonis) (74-92sa).

[31] Judgment of the Arbitrator, In re Petition of AT&T Communications of New Jersey, Inc. for Arbitration with Bell Atlantic-New Jersey, Inc. Pursuant to § 252 of the Telecommunications Act of 1996, BPU Docket No. TO96070519 (NJBPU Nov. 8, 1996) ("Arbitration Decision") (99-113a).

[32] "Permanent" as used in this brief is intended to refer to the rates which the parties agree will be applicable during the term of the agreement.

[33] Arbitration Decision, p. 9 (107a); Local Competition Order, pp. 223-234 (125-36a). All other arbitrators did otherwise; (cont'd. on next page...)

BA-NJ and AT&T then proceeded over a period of seven months to negotiate the language of a detailed interconnection agreement, but were unable to do so before the completion of the Generic Proceeding. BA-NJ maintained its position during these negotiations that the rates adopted by the arbitrator should not be approved by the Board when it reviewed the parties' final interconnection agreement.

During this period of negotiations, the Interconnection Phase of the Generic Proceeding proceeded before the Board. In contrast to the limited representation at the AT&T Arbitration, all segments of the telecommunications industry, including the Ratepayer Advocate, were invited to participate in this Comprehensive Generic Proceeding.[34] Significantly, and in sharp

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with the sole exception of the AT&T arbitrator, every interconnection agreement approved in New Jersey at the time of the initial Generic Proceeding decision established interim rates and expressly provided for those rates to be replaced by the Generic Proceeding rates when established. Local Comp. Order, pp.221, 230-33 (123, 132-35a). In the case of MCI, a carrier which sought permanent rates to be set in an arbitration, the arbitrator found that only interim rates, based on the FCC default proxy rates, were appropriate given the pendency of the Generic Proceeding. In fact, in the MCI proceeding, MCI proposed rates based upon the same Hatfield Model submitted by AT&T in its arbitration. See Arbitrator's Award, I/M/O the Petition of MCI Telecommunications Corp. for Arbitration with Bell Atlantic - New Jersey, Inc. Pursuant to Section 252 of the Telecommunication Act of 1996, Docket No. TO96080621 (Dec. 19, 1996), pp.12-17 (110-115sa).

[34] The Interconnection Phase involved the participation of fourteen parties as well as the Ratepayer Advocate, who all offered direct and rebuttal testimony, engaged in extensive (cont'd. on next page...)

contrast to the AT&T Arbitration, four different versions of voluminous cost studies (including BA-NJ's cost studies, AT&T's and MCI's Hatfield Model 2.2.2., Sprint's Benchmark Cost Model 2, and the Ratepayer Advocate's TECM Model) were submitted for Board consideration.[35] Twenty days of hearings and depositions took place.[36] Fifteen parties submitted initial briefs and reply briefs.[37] AT&T was vigorously and intensely involved in all aspects of the Generic Proceeding, and even incorporated portions of the record it developed in the AT&T Arbitration for the Board's consideration in the Generic Proceeding.[38]

On July 17, 1997, the Board rendered its decision in the Generic Proceeding on the terms and conditions relating to interconnection, access to UNEs and resale.[39] The Board's

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discovery and cross examination, introduced exhibits, conducted depositions, and/or filed cost evidence. See Local Competition Order, pp.6-7 (6-7sa). Forty-five witnesses sponsored prefiled direct and rebuttal testimony, and were made available for cross-examination. Id. at p.224 (126a). More than two hundred exhibits were admitted into evidence.

[35] See id. (126a).

[36] See id. (126a).

[37] See id. (126a).

[38] See, e.g., Arbitration Decision, introduced as Generic Proceeding Exhibit AT&T 133 (94-108sa); excerpts from Generic Proceeding Exhibits AT&T 49, 50, and 156 (116-20sa).

[39] Accordingly, the Generic Proceeding was completed eight months, not "more than a year" as the RPA contends (RPA Brief at 11) after the arbitrator issued his recommendation -- and before the parties filed any interconnection agreement for Board review.

decision on these issues determined the permanent rates for use in interconnection agreements that had been executed prior to the Board decision. All arbitrated agreements, except the then-pending agreement with AT&T, had, per the interconnecting carriers' requests and/or the arbitrators' rulings, labeled rates "interim" pending the outcome of the Generic Proceeding, at which time the agreements would be amended to incorporate the Board's determination of the rates.[40]

The rates which the Board found to be cost-based and consistent with the requirements of the Act were substantially different from the rates recommended by the arbitrator in the AT&T Arbitration.[41] As the Board stated in the Local Competition Order, application of the Hatfield Model (the only model considered by the Arbitrator), does not result in just and reasonable rates for interconnection and access to UNEs as required by the Act.[42] Accordingly, the Board found that to comply with the Act's requirement that rates be just and reasonable, the rates recommended by the arbitrator could not be approved. The Board then concluded that <u>if the parties could not negotiate different rates</u>, the rates in the AT&T/BA-NJ Interconnection Agreement would in fact be those established in

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[40] <u>See</u> Local Competition Order at 230-33 (132-35a).

[41] <u>Id.</u> p. 244 (146a).

the Generic Proceeding.[43] Although AT&T has circulated a draft interconnection agreement incorporating the arbitrator's recommended rates, the Board noted that since the parties had still not submitted an executed interconnection agreement for its review, this was the first opportunity the Board had to address the rates in the arbitrator's decision.[44]

Given the Board's July 17, 1997 oral decision, BA-NJ determined that it could not sign the draft of the interconnection agreement circulated by AT&T, which incorporated rates that the Board had decided did not comply with the requirements of the Act. BA-NJ recommended to AT&T, by letter dated July 25, that the parties submit two versions of an Interconnection Agreement, one with the rates approved by the Board in the Generic Proceeding and one with the rates

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[42] Id. pp. 62-64, 249 (13-15sa, 151a).

[43] Id. at 249, 254 (151a, 156a); Transcript of BPU Agenda Meeting of September 9, 1997, p. 2 (122sa) ("[n]egotiated issues are not affected by this, only the arbitrated issues"); Transcript of Special BPU Agenda Meeting of July 17, 1997, pp. 80-81 (129-30sa) (deputy attorney general advising the Board that "[the Generic Proceeding rates] will in effect set rates for AT&T and Bell Atlantic. Of course those rates can still be negotiated off of if the parties are able to reach some sort of an accommodation apart from those rates").

[44] Local Competition Order at p. 221, n. 19 (123a) (noting that AT&T and BA-NJ had not yet acted upon the Arbitrator's Decision, i.e., they had not yet submitted to the Board an interconnection agreement embodying that decision, and the decision "remained open" at the time of the Board's deliberations in the Interconnection Phase of the Generic Proceeding).

recommended by the AT&T arbitrator.[45] That same day, AT&T signed the draft agreement that contained the arbitrated rates and submitted it to the Board without BA-NJ's signature or consent.

On August 5, 1997, with AT&T's consent but with only BA-NJ's signature, BA-NJ submitted to the Board a version of the parties' interconnection agreement that included the Generic Proceeding rates and a statement that both parties reserved all their rights. The parties further agreed that the party whose version of the interconnection agreement was rejected by the Board would execute the other party's version of the agreement.[46]

The parties thereafter submitted initial briefs and reply briefs for the Board's consideration in connection with its review of each parties' version of the interconnection agreement. On September 9, 1997, the Board rejected both submissions and requested the parties to submit an interconnection agreement signed by both parties.[47] The Board again announced that to comply with the Act, it "must insert the generic rates in place of the arbitrated rates."[48]

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[45] Letter from Anne S. Babineau of BA-NJ to John J. Langhauser of AT&T, dated July 25, 1997 (131-32sa).

[46] Each party agreed that it would do so under protest and subject to the express reservation of rights to challenge the Board's decision.

[47] See Local Competition Order, p. 221 n. 19 (123a).

[48] Id. at 249 (151a).

On September 15, 1997, BA-NJ and AT&T submitted a fully-executed interconnection agreement containing the rates approved in the Generic Proceeding. On December 22, 1997, the Board issued an Order approving the executed interconnection agreement.[49]

On December 2, 1997, the Board issued its 262-page Local Competition Order setting forth in detail the basis for its determinations orally announced on July 17.[50] In that Order the Board, among other things, set forth at great length the reason why it determined that the rates it established in the Generic Proceeding, rather than the rates recommended by the arbitrator, should be used in the AT&T/BA-NJ Interconnection Agreement.[51]

D. The Present Action -- Procedural History

AT&T commenced this action before the District Court under section 252(e)(6) of the Act through a Complaint filed on November 24, 1997 (which was later amended on January 12, 1998) against the Board, the Commissioners of the Board, and BA-NJ. In its Amended Complaint AT&T sought review of certain terms of the AT&T/BA-NJ Interconnection Agreement approved by the Board on December 22, 1997, including the rates that the Board determined that AT&T should pay to BA-NJ for UNEs.

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[49] See Agreement Order (158-65a).

[50] Local Competition Order, pp. i-iii (Preface) (115-17a).

Following the District Court's entry of a Consent Order for Intervention by the RPA on February 2, 1998 and certain other filings that are not directly relevant to this appeal, on August 3, 1998, the District Court entered an order setting forth a briefing and oral argument schedule. Following full briefing and oral argument, on June 6, 2000 the District Court issued its ruling, inter alia, affirming the Board's decision to substitute the Generic Proceeding rates for the arbitrated rates in the AT&T/BA-NJ Interconnection Agreement, but reversing and remanding the Board's methodology for establishing the Generic Proceeding rates. The RPA filed a Notice of Appeal on June 30, 2000. This Court entered a Briefing and Scheduling Order on October 11, 2000, and the RPA filed its brief and appendix on November 20, 2000.

STATEMENT OF RELATED CASES AND PROCEEDINGS

In addition to the pending FCC proceeding cited by the RPA (RPA Brief at 16), two other pending proceedings are related to the present case. First, the Board has reopened the Generic Proceeding and is currently conducting hearings in that matter, for the purpose of establishing new rates for interconnection, UNEs, and resale. I/M/O the Review of Unbundled Network Elements Rates, Terms and Conditions of Bell Atlantic-New

[51] Id. at 221-254 (123-56a).

Jersey, Inc., BPU Docket No. TO 00060356. Second, pursuant to AT&T's petition dated November 15, 2000, AT&T and VNJ are currently engaged in an arbitration pursuant to Section 252 of the Act for the purpose of establishing the terms and conditions of a new interconnection agreement. See AT&T Petition for Arbitration with Verizon Pursuant to Section 252 of the Telecommunications Act of 1996, BPU Docket No. TO00110893.

No proceeding related to this case has been or is about to be before this Court.

STANDARD OF REVIEW

The issues on appeal present questions of law that are subject to de novo review by this Court. Whether the Court should decline jurisdiction to issue the advisory opinion sought by the RPA (Issue 1, supra) arises only in the context of the District's Court's decision and events occurring thereafter, was thus not addressed by the District Court, and is subject to de novo review. The Court likewise should review de novo the District Court's determination that the Board had authority under the Act to approve an interconnection agreement incorporating cost-based rates determined by the Board in a comprehensive proceeding, rather than rates recommended in a prior arbitration proceeding that were based solely on a cost study that the Board determined was not compliant with the Act

(Issues 2 and 3, supra). See, e.g., GTE South, Inc. v. Morrison, 199 F.3d 733 (4th Cir. 1999).

SUMMARY OF ARGUMENT

As a preliminary matter, this appeal has been brought to resolve a moot issue, and should be dismissed on that basis alone. The portion of the District Court's holding that is challenged herein is limited to the court's affirmance of the Board's authority to substitute the Generic Proceeding rates for arbitrated rates in the AT&T/BA-NJ Interconnection Agreement. The District Court also remanded the Board's methodology for determining those Generic Proceeding rates. Now, as the Board works to establish new generic rates in accordance with that remand, AT&T has agreed, in a pending arbitration proceeding to establish the terms of a new interconnection agreement with VNJ, to abide by the outcome of the ongoing Generic Proceeding with respect to UNE rates. Thus, there is no likelihood that the statutory violation alleged by the RPA will recur. Moreover, in light of the District Court's remand of the initial Generic Proceeding rates, the RPA has not actually suffered any redressable injury in fact due to the alleged violation, and therefore lacks standing to bring this appeal. This Court should decline jurisdiction to issue the purely advisory opinion sought by the RPA.

With respect to the merits of the RPA's claim, the Board's decision to employ the Generic Proceeding rates in lieu of the non-Act compliant arbitrated rates in the AT&T/BA-NJ Interconnection Agreement was consistent with, and, indeed, mandated by the Act. The RPA's formalistic conception of the Board's authority under the Act would unduly limit the Board's flexibility and ignore the structure and spirit of the Act, the unusual facts and procedural history of this matter, and the practices developed by State commissions implementing the Act around the country. While the arbitrator's recommendation was based on limited participation and a demonstrably deficient record (a conclusion the RPA does not challenge), the Generic Proceeding rates were based on a large body of evidence developed by numerous active parties, including the RPA. The Board's approval of the AT&T/BA-NJ Interconnection Agreement incorporating the Generic Proceeding rates was entirely consistent with the Board's authority under the Act to suggest and/or impose reasonable terms and conditions as part of the arbitration of interconnection agreements. See, e.g., 47 U.S.C. §§ 251(c)(2), 252(b)(4). Similarly, the RPA's position ignores the Board's authority under Section 252(e) to review - and alter it if deems it appropriate to do so - arbitrated terms the Board finds to be inconsistent with the Act.

In addition, the RPA's reliance on principles of "statutory construction" and "Congressional intent" is based on a false premise. Specifically, neither the Board nor the District Court mandated uniform statewide rates for all arbitrated agreements. The Board was clear that it would consider rates other than those approved in the Generic Proceeding. The District Court's holding was limited to affirming the Board's decision to substitute the Generic Proceeding rates only with respect to the AT&T/BA-NJ Interconnection Agreement, where it is beyond dispute that the "arbitrated" rates could not withstand scrutiny under the Act and where the Board in fact authorized the parties to negotiate other rates. Moreover, the RPA's premise that a degree of consistency in interconnection agreement rates is contrary to the legislative intent is unsupported by the Act. Indeed, numerous State commissions have adopted uniform interconnection rates by way of generic cost proceedings or consolidation of the cost/rate portions of these proceedings.

Finally, the RPA's preemption argument fails for similar reasons. Neither the Board nor the District Court have established a "policy of generic rate substitution." Rather, the Board found that in the limited case of AT&T, the Generic Proceeding rates should be employed rather than the non-Act compliant arbitrated rates - unless the parties could negotiate otherwise. Neither the Board's nor the District Court's

decision precludes any party from seeking more favorable interconnection provisions than those established in generic proceedings.

ARGUMENT

POINT I

THIS APPEAL, WHICH HAS BEEN BROUGHT TO RESOLVE A MOOT ISSUE RAISED BY A PARTY WITHOUT STANDING, SHOULD BE DISMISSED

While the District Court was correct in upholding the power of the Board to incorporate the rates established in its 1997 Generic Proceeding into the AT&T/BA-NJ Interconnection Agreement, this Court lacks jurisdiction to consider the challenge to that action which is presented by this appeal. The following facts are critical in this regard:

-- the portion of the District Court's holding that is challenged in this appeal is that court's affirmance of the Board's authority to substitute the Generic Proceeding rates for the arbitrated rates in the AT&T/BA-NJ Interconnection Agreement and, in any event, the District Court remanded the Board's methodology for determining those Generic Proceeding rates (16a);

-- the AT&T/BA-NJ Interconnection Agreement was to remain in effect until July 31, 2000 and could then be terminated by either party;[52]

-- AT&T and VNJ are currently engaged in an arbitration proceeding pursuant to Section 252 of

[52] Order Approving Interconnection Agreement dated December 22, 1997 at 3 (160a).

the Act in an effort to establish the terms and conditions of a new interconnection agreement;[53]

-- AT&T is not taking part in this appeal;[54] and

-- in its pending arbitration with VNJ, AT&T has indicated that, with respect to UNE rates (and all other issues concerning UNEs), it would abide by the outcome of the ongoing Generic Proceeding commenced by the Board following the District Court's remand.[55]

Thus, no determination at this time regarding the issue raised by the RPA will have any effect on the interconnection agreement before the Court.

First, the Court should dismiss the RPA's appeal because the above-referenced intervening events have rendered moot the issues raised herein. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." County of Los Angeles v. Davis, 440 U.S. 625, 631, 99 S. Ct. 1379, 59 L. Ed. 2d 642 (1979) (citation & quotations omitted). Two conditions must be satisfied to render a case moot: "(1) it can be said with

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[53] See Petition for Arbitration of Interconnection Terms, Conditions and Prices with Verizon New Jersey Inc. submitted on behalf of AT&T Communications of NJ, L.P., TCG Delaware Valley, Inc. and Teleport Communications New York, dated November 15, 2000 ("AT&T Arbitration Petition") (133-48sa).

[54] Letter dated December 8, 2000 from Samuel P. Moulthrop to Marcia M. Waldron, Clerk, United States Court of Appeals for the Third Circuit.

[55] See letter dated June 28, 2000 from the Board to all parties announcing the reopening of the Generic Proceeding (149-54sa); AT&T Arbitration Petition at 11 (143sa).

assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur," and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." Ibid. (citations omitted).

In the present case there can be no reasonable expectation that the alleged violation will recur because AT&T in its new arbitration has determined to rely on the rates determined in the current Generic Proceeding. Thus, the Board will not be in a position to review AT&T arbitrated rates that are substantially divergent from rates the Board determines comply with the Act. In addition, the Board expected to complete the initial Generic Proceeding in time to incorporate its results into its review of arbitrated agreements, but was unable to do so due to the delays and uncertainties that arose during that proceeding. See Local Comp. Order at 242 (144a). That unusual set of circumstances is extremely unlikely to recur.[56] As for "interim events", the District Court's remand of the initial Generic Proceeding rate-setting methodology and AT&T's decision to abide by the now-pending Generic Proceeding in its

[56] It is anticipated that hearings in the current Generic Proceeding will be complete in early February, 2001. See 149-56sa. In accordance with the Act's requirements that arbitrations are to be completed within 9 months of the initial request for negotiations (47 U.S.C. § 252(b)(4)(C)), the pending AT&T arbitration is not scheduled to be complete until April 3, 2001. See 133sa.

new arbitration certainly eliminate any effect of the Board's decision to require the initial Generic Proceeding rates in the agreement which is before the Court. The issue is moot also because the RPA ultimately may agree with the rates the Board sets in the reopened Generic Proceeding, in which the RPA is taking part.

Second, the RPA lacks standing to bring this appeal because it has not been aggrieved by the District Court's disposition of the matter, and the Court's resolution of the issues raised by the RPA's appeal would afford the RPA no actual, affirmative relief. See, e.g., The Pitt News v. Fisher, 215 F.3d 354, 359 (3d Cir. 2000) ("to demonstrate Article III standing, plaintiffs must demonstrate that they have suffered an injury-in-fact, that the injury is causally connected and traceable to an action of the defendant, and that it is redressable") (citation omitted). Before the District Court the RPA challenged the Generic Proceeding rates, and the District Court did in fact remand those rates. Unsatisfied with the District Court's reasoning, the RPA now wants this Court in effect to affirm the District Court's remand on additional grounds. In short, the RPA's argument -- if successful -- would not change the result of the District Court's decision to invalidate the agreement as approved, but merely would provide another reason to affirm the District Court. See Armotek Indus., Inc. v. Employers Ins., 952

F.2d 756, 759 n. 3 (3d Cir. 1991); Cobb v. Aytch, 539 F.2d 297, 300 (3d Cir. 1976) ("[i]t is settled law that a party cannot appeal from a decision which is not adverse to him"), cert. denied, 429 U.S. 1103, 97 S. Ct. 1130 (1977), 51 L. Ed. 2d 554.

Indeed, the Court's inability to fashion a remedy in the present case is underscored by the RPA's failure to articulate the relief that it seeks. The RPA requests only that the Court "reverse and vacate" the District Court's holding that the Board had authority to request the parties to employ the Generic Proceeding rates in lieu of the arbitrated rates and to "provide any other relief that the court deems appropriate." RPA Brief at 42. As noted above, however, the District Court remanded the Generic Proceeding rate-setting methodology, and AT&T and VNJ are currently arbitrating a new agreement; the Court's "reversal" of the District Court's limited holding with respect to rate "substitution" would thus be without consequence.

Likewise ineffectual would be the additional relief the RPA sought before the District Court, i.e., extending the terms of the AT&T/BA-NJ Interconnection Agreement and imposing the arbitrated rates during that extended term. Given the Board's finding that the rates proposed by AT&T in the initial arbitration did not comply with the Act, AT&T's own position before the District Court that any imposition of the arbitrated

rates only be effective through July 2000,[57] and AT&T's decision to arbitrate a new agreement incorporating new rates from the pending Generic Proceeding, such relief is neither available nor desired by the affected parties. See Citizens' Util. Ratepayer Bd. v. McKee, 946 F. Supp. 893, 895 (D. Kan. 1996)(holding that the court lacked jurisdiction to hear plaintiff ratepayer board's request to intervene in section 252 arbitration proceedings, on ground that "aggrieved party" under section 252(e)(6) is limited to interconnecting service provider or LEC adversely affected by the state commission determination).

Finally, federal courts have no jurisdiction to issue the purely advisory opinion sought by the RPA and this appeal should be dismissed on that ground alone. Roe v. Operation Rescue, 919 F.2d 857, 861 (3d Cir. 1990) (declining to issue an advisory opinion because other independent grounds not appealed by defendant were sufficient to affirm district court's decision). As no party has appealed the District Court's remand of the Generic Proceeding rates on the basis articulated by that court, that basis alone supports the District Court's determination and this Court need not reach the issue raised in the RPA's appeal.

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[57] Transcript of Oral Argument in the United States District Court for the District of New Jersey, Civil No. 97-5762 & 98-0109, June 15, 1999, at 96-97 (160-61sa) (comments of AT&T counsel).

POINT II

THE BOARD'S INCORPORATION OF THE GENERIC PROCEEDING RATES INTO THE AT&T-BA-NJ INTERCONNECTION AGREEMENT WAS ENTIRELY CONSISTENT WITH THE BOARD'S AUTHORITY UNDER THE TELECOMMUNICATIONS ACT OF 1996

A. The Board's Decision To Employ The Generic Proceeding Rates In Lieu Of The Non-Act Compliant Arbitrated Rates In The AT&T/BA-NJ Interconnection Agreement Was Consistent With, And, Indeed, Mandated By, The Act, And The District Court Properly Analyzed The Commission's Role In Reviewing Interconnection Agreements Under The Act

As the District Court recognized, Section 252(c) of the Act requires the Board to ensure that any arbitrated agreement complies with the ILEC's obligation under the Act to provide a CLEC access to network elements on an unbundled basis on rates, terms and conditions that are just, reasonable and nondiscriminatory. 47 U.S.C. §§252(c)(1), 251(c)(3). Section 252(e)(2)(B) gives the Board authority to approve any arbitrated agreement or to reject it if the agreement does not meet the requirements of Section 251, the regulations prescribed by the FCC, or the pricing standards of Section 252(d). As the District Court also recognized, these sections of the Act give a State commission "broad authority to examine every aspect of an interconnection agreement for fairness of its terms and rates." Opinion at 9 (14a).

The RPA's formalistic conception of the Board's authority under the Act would unduly limit the Board's flexibility and